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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-

UNITED PARCEL SERVICE, INC.,
an Ohio Corporation,
UNITED PARCEL SERVICE, INC.,
a New York Corporation,
and
UNITED PARCEL SERVICE OF AMERICA, INC.,
a Delaware Corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ARROW CARRIER CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARROW CARRIER CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

United Parcel Service, Inc., an Ohio corporation, United Parcel Service, Inc., a New York corporation, and United Parcel Service of America, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 30, 1979. The respondents are: United States of America, Interstate Commerce Commission, Arrow Carrier Corp., A. F. T. Services, Inc., Alco Express Co., Barnet's Express, Inc., Borough Express, Inc., Brad-

ley's Express, Inc., Consolidated Carriers Corp., Fowler & Williams, Inc., Friedman's Express, Inc., Greenberg's Express, Inc., Hempstead Delivery Co., Inc., Mazzeo & Sons Express, Morton Delivery, New Deal Delivery Service, Siegel & Cohen Express, Inc., Stone's Express, Inc., Stuart Express Co., Inc., Tri-State Transportation Co., Inc., United Marlboro Carrier Corp.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (A45-A54)[1] has not yet been officially reported. The decision of Interstate Commerce Commission (A21-A44) is published at 127 M. C. C. 292, having been rendered on reconsideration of the report of the Commission (Review Board Number 5) (A1-A20) which has not been published.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 30, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where a non-carrier holding company has total control over two carrier subsidiaries through direct, 100% stock ownership of each, and operates the subsidiaries as one fully integrated system, does the holding company "acquire control" of a carrier under Section 11348(a) of the Interstate Commerce Act when the two subsidiaries merge into one, with no other change whatsoever in control or in operations?

1. References herein to "A" pages are to pages in the appendix to this petition.

STATUTE INVOLVED.

Sections 11343(a) and 11348(a) of the Interstate Commerce Act, as revised and codified, 49 U. S. C. §§ 11343(a) and 11348(a),[2] provide in pertinent part as follows:

> "§ 11343. Consolidation, merger, and acquisition of control
>
> "(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> "(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.
>
> * * *
>
> "(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

2. The Interstate Commerce Act was revised, codified and enacted, without substantive change, as subtitle IV of Title 49 of the United States Code, 49 U. S. C. § 10101 *et seq.*, on October 17, 1978, which was after the Commission's decision in this case. Sections 11343(a) and 11348(a) of the new codification are to the same effect as former Sections 5(2)(a) and 5(4) of the Interstate Commerce Act [formerly found at 49 U. S. C. §§ 5(2)(a) and 5(4)]. Section 3 of the law enacting the new codification, Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1337, 1466, provides that an action taken under a law replaced by it shall be deemed to have been taken under the new codification. Accordingly, all references herein are to the new codified sections even where this Court or other courts referred to the old section numbers.

"(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers."

* * *

"§ 11348. Interstate Commerce Commission authority over noncarrier that acquires control of carrier

"(a) When the Interstate Commerce Commission approves and authorizes a transaction . . . in which a person not a carrier providing transportation subject to the jurisdiction of the Commission under chapter 105 of this title acquires control of at least one carrier subject to the jurisdiction of the Commission, the person is subject, as a carrier, to the following provisions of this title that apply to the carrier being acquired by that person, to the extent specified by the Commission: section 10764, subchapter III of chapter 111, and sections 11301, 11302, 11709, 11711, 11901(f), (h)(1), 11909(a)(1), (b), and 11911(a)."

STATEMENT.

As the majority of the Court below impliedly did,[3] and the concurring judge expressly did,[4] this petition questions the correctness or at least the current viability of a decision of this Court rendered 22 years ago, in **Alleghany Corp. v. Breswick & Co.**, 353 U. S. 151 (1957). Thus petitioners seek to have the Court restore a degree of reason to the scope of the term "acquisition of control" in Sections 11343(a) and 11348(a) of the Interstate Commerce Act.

Specifically, petitioners seek to have the Court overrule **Alleghany**, if, as the Court of Appeals felt compelled to conclude, **Alleghany** means that a merger of two wholly-owned subsidiaries which accomplishes only a corporate simplification and results solely in administrative economies, such as elimination of dual record keeping, accounting and I. C. C. filings, but has no effect on their parent company's control relationship, would also result in an "acquisition of control" by the parent company over the subsidiary being merged or over the carrier rights and properties being transferred in the merger.

Alternatively, petitioners seek to have the Court make clear that, in order for an acquisition of control to result from the merger of subsidiaries, **Alleghany** requires a meaningful change in the parent-subsidiary control relationship, a change which the Court found existed in **Alleghany** because of its particular facts only; and to limit

3. The majority stated (A52-A53):

"Although we sympathize with the petitioners' arguments that *Alleghany* involved unique facts, that *Alleghany* itself sought carrier status and Commission control, that corporate simplification should be encouraged rather than discouraged, and that here UPS-A did not acquire control but only retained it, it appears to us that both Congress and the Supreme Court have determined these issues contrary to the petitioners' views and *we are in no position to overrule either body. It may be that only Congress or the Supreme Court can offer petitioners any relief.*" (Emphasis added and footnote omitted.)

4. Senior District Judge William J. Campbell, concurring, stated (A53-A54):

4. (Cont'd.)

"I agree with the Court's conclusions that *Alleghany Corporation v. Breswick & Co.*, 353 U. S. 151, 77 S. Ct. 763, 1 L. Ed. 2d 726 (1957) controls this case. I therefore join in the result. I am compelled to add, however, that the portion of the *Alleghany* holding which defines an 'acquisition of control' seems to stress form over substance. In *Alleghany*, as in the present case, the parent corporation controlled nothing upon completion of the merger that it did not control prior to the merger. As Justice Douglas noted in dissent, 'one who has control . . . does not acquire it when he merely changes the method or means of its exercise.' *Id.* at 176. *Perhaps the time has come for a re-examination of Alleghany* in the light of more recent judicial pronouncements on the question of what constitutes corporate control." (Emphasis added.)

Alleghany accordingly and hold that it does not govern the present case.

At issue in this case is an attempt by the Interstate Commerce Commission to regulate United Parcel Service of America, Inc. ("UPS-America"), a corporation which is not, and has never been, engaged in providing transportation subject to the Commission's jurisdiction. Commission regulation of the non-carrier parent was imposed as a condition to the Commission's approval of the merger of two regulated carrier subsidiaries of UPS-America. The Commission's basis for doing so was Section 11348(a) of the Act [Section 5(3) in **Alleghany**, which later became Section 5(4)]. Section 11348(a) empowers the Commission to subject a person which is not a carrier to specified provisions of the Act, relating to reporting and accounting requirements, the issuance of securities and the assumption of liability with respect to the securities of others.

The Commission's jurisdiction under Section 11348(a) is expressly predicated on its having approved and authorized a transaction in which a non-carrier "acquires control of at least one carrier subject to the jurisdiction of the Commission." Section 11343(a), in turn, makes lawful, subject to approval and authorization of the Commission, the consolidation or merger of two or more carriers; the purchase, lease or contract to operate property, or acquisition of control, of one carrier by any number of carriers; the "acquisition of control of at least 2 carriers by a person that is not a carrier;" and the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers."

Sections 11348(a) and 11343(a) are thus seen to be interrelated; but not all transactions within the Commission's jurisdiction under Section 11343(a) give it a basis for acting under Section 11348(a). The merger of two

carriers, while requiring the Commission's approval under Section 11343(a), will not provide such a basis unless, in the transaction, a person which is not a carrier "acquires control" of a carrier.

The question of what constitutes an "acquisition of control" by a non-carrier in the context of a merger of two controlled carriers was addressed by this Court in **Alleghany Corp. v. Breswick & Co.**, *supra*, 353 U. S. 151 (1957). Relying entirely on **Alleghany**—and obviously doing so with reluctance, the Court of Appeals held that the Commission was justified in finding that a non-carrier holding company, which totally controls, supervises and manages the businesses of its two wholly-owned carrier subsidiaries, would "acquire control" of a carrier under Section 11343(a), and would therefore become subject to I. C. C. regulation under Section 11348(a), when it causes the two subsidiaries to merge.

As indicated above, all three members of the panel of the Court of Appeals were obviously distressed over the illogical result which they concluded **Alleghany** requires. The majority judges stated (A52-A53) that they sympathized with petitioners' arguments that **Alleghany** involved unique facts (see pages 21-22, *infra*), that in **Alleghany** the non-carrier holding company itself sought the application of Section 11348(a) to it and sought Commission regulation, that corporate simplification (the sole purpose of the merger here) should be encouraged rather than discouraged, and that UPS-America did not acquire but merely retained control here. The majority below also noted (A53, n. 2) Justice Douglas' dissent in **Alleghany**, in which Chief Justice Warren and Justice Black concurred, quoting Justice Douglas' statement (353 U. S. 151, at 177) that the merger in **Alleghany** "was an intra-system rearrangement of properties that did not affect one whit

Alleghany's 'control' in the statutory sense." But the majority felt bound by **Alleghany,** and their sympathy with UPS' position went no further than to refer petitioners to Congress or this Court for relief.

Judge Campbell went further in his concurring opinion (A53-A54), adding that:

> "[T]he portion of the *Alleghany* holding which defines an 'acquisition of control' seems to stress form over substance. In *Alleghany,* as in the present case, the parent corporation controlled nothing upon completion of the merger that it did not control prior to the merger. . . . Perhaps the time has come for a re-examination of *Alleghany* in the light of more recent judicial pronouncements on the question of what constitutes corporate control."

It is the purpose of this petition to show that the time has indeed come for a re-examination of **Alleghany,** which has not been followed by any court in a merger case until the present case. It is time for the term "acquisition of control" in Sections 11348(a) and 11343(a)—successors to Sections 5(3) and 5(2)(a) in **Alleghany,** to be given a meaning which makes sense, one which bears a reasonable relationship to the actualities of corporate control and to its clear meaning and congressional intent.

The Facts of the Case.

UPS-America is a holding company which owns 100% of the outstanding stock of, and thereby has the power to control, United Parcel Service, Inc., an Ohio corporation ("UPS-Ohio"), and United Parcel Service, Inc., a New York corporation ("UPS-New York"), both motor carriers subject to the Commission's jurisdiction. As the record shows, and as no one has denied, UPS-America controls

both subsidiaries as completely as can be effected, and runs them as one entity insofar as service and operations are concerned, as one fully-integrated system throughout the contiguous states. UPS-America does not control any other I. C. C. regulated carriers. UPS-America's acquisition of control of UPS-Ohio and UPS-New York took place when they were formed, but both incorporations preceded the effective date of the Motor Carrier Act of 1935, 49 Stat. 551, and, therefore, did not require I. C. C. authorization.

UPS-New York operates as a motor common carrier between all points in the Middle Atlantic and New England states—generally Maine through Virginia. UPS-Ohio operates as a motor common carrier generally between all points throughout the rest of the contiguous 48 states—the area not served by UPS-New York. Joint service is provided by the two carriers in their common carrier operations through interchange arrangements between their respective operating authorities, without any physical interruption of operation of vehicles or movement of packages. Thus, together the two carriers provide a single, fully integrated parcel delivery service, with uniform joint interstate transportation rates (only minor intrastate variations) and identical service features, throughout the entire 48 contiguous states, except for certain relatively minor territorial restrictions on the authority to conduct operations.

Culminating a United Parcel Service program of progressive corporate simplification which has been going on since 1953, and which is in accordance with the Commission's long-standing policy in favor of corporate simplification, UPS-Ohio and UPS-New York filed a joint application with the Commission for authority under Section 11343(a) of the Act [formerly Section 5(2)(a)], to merge UPS-New York into UPS-Ohio, with UPS-Ohio the

surviving company. UPS-America joined in the application to indicate its continuing control of UPS-New York and UPS-Ohio, as required by the application form prescribed by the Commission's regulations in the case of a carrier merger (49 C. F. R. § 1134.1), and urged that the application be dismissed as to UPS-America. A protest to the merger application was filed jointly by 20 motor carriers, who opposed the proposed merger on the ground of the applicants' alleged unfitness.

The record establishes without contradiction that the sole purpose of the proposed merger is to achieve corporate simplification. By eliminating one of these two carrier entities, the merger would simplify UPS-Ohio's and UPS-New York's record keeping, corporate accounting and reporting work, preparation of filings to state and federal agencies, and similar administrative chores. A large amount of non-productive work involved in maintaining separate corporate and accounting records and making required reports and other filings for two corporations would be eliminated by the merger. Further, the merger would eliminate altogether certain other record keeping, accounting, reporting and . riff publication work presently required with respect to movements between UPS-New York's and UPS-Ohio's respective service areas.

The merger would have no effect whatever on the physical operations of UPS-Ohio and UPS-New York or on the service they offer to the public, since UPS-New York and UPS-Ohio already provide a single, fully integrated service. The record establishes without contradiction that the joint line service rendered by UPS-New York and UPS-Ohio is the same as the single line service which would be rendered by a single carrier. The service is uniform. After consummation of the merger, UPS-America would continue to control, through direct stock ownership

of the surviving corporation, the carrier rights and properties presently owned by UPS-New York and UPS-Ohio.

The Decision of the Commission.

In its final Decision and Order dated August 21, 1978, the Commission approved and authorized the merger of UPS-New York into UPS-Ohio as being consistent with the public interest (A41, A42). However, it refused to dismiss the application as to UPS-America because it found that, upon consummation of the merger, UPS-America would become a carrier within the meaning of Section 11348(a) of the Act [formerly Section 5(4)] by reason of its "acquisition of control" of the operating rights and properties of UPS-New York. This acquisition of control would be effectuated through consummation of the merger itself (*i.e.*, through the reduction of operating subsidiaries from two to one) (A27, A41, A42).

The Commission's finding on the acquisition of control requirement was based solely on two factors: (1) the obvious fact that "[w]here once there were two separate entities to be dealt with legally, financially and operationally, after the merger there will be one;" and (2) that UPS-America "'. . . had expected by the proposed merger to simplify its corporate accounting and reporting work as well as the regulatory chores of the Commission'" (A27).[5] These factors, the Commission concluded, demonstrate that UPS-America will obtain an ability to "accomplish financial transactions or operational changes with greater legal ease" (A27), which this Court had stated, in **Alleghany Corp. v. Breswick & Co.**, *supra*, 353 U. S. at 169, to be an example of a "significant increase in power," and thus an acquisition of control.

5. In fact, as the record clearly shows, it is primarily the corporate accounting and reporting work, as well as the regulatory chores, of UPS-Ohio and UPS-New York, not UPS-America, which would be simplified through the merger.

The Decision of the Court of Appeals.

Petitioners have not consummated the merger, and will not do so as long as the condition is I. C. C. control over UPS-America. Instead, pursuant to 28 U. S. C. §§ 2321 and 2342, they petitioned the United States Court of Appeals for the Seventh Circuit to review the final order of the Commission insofar as it held that the proposed merger would result in UPS-America's becoming a carrier, subject to I. C. C. regulation.

As we have developed above, it was solely on the basis of this Court's decision in **Alleghany Corp. v. Breswick & Co.**, *supra*, 353 U. S. 151, that the Court of Appeals held "the Commission was justified in finding that the merger of UPS-NY into UPS-OH involved an 'acquisition of control' of UPS-NY by UPS-A within the meaning of Sections 5(2) and 5(4) of the Act" (A53). The Court of Appeals felt bound by **Alleghany** in view of similarities between **Alleghany** and this case (despite the many important differences) In each case, "two subsidiaries telescoped into a single subsidiary" (A49). It reasoned (A52) that the important factors in **Alleghany** were (i) that the merging subsidiary "will be no more," as is true of any merger, and (ii) that, as was said in **Alleghany**, " 'a merger is the ultimate in one company obtaining control over another.' "

While expressly "sympathizing" with petitioners' arguments (A52-A53), including their argument concerning the unique facts of **Alleghany**, the Court of Appeals stated that "it appears to us that both Congress and the Supreme Court have determined these issues contrary to the petitioners' views. . . ."

Petitioners dispute that Congress determined or even intended to resolve the issues in this case contrary to petitioners' position, but certainly agree with the Court of

Appeals' statement (A53) that "[i]t may be that only Congress or the Supreme Court can offer petitioners any relief." And, of course, Judge Campbell, concurring, went further in his stated reluctance to follow **Alleghany**. He was constrained to remark that the relevant portion of **Alleghany** "seems to stress form over substance," and expressly suggested "a re-examination of *Alleghany*" (A53-A54).

Hence, this petition.

REASONS FOR GRANTING THE WRIT.

Alleghany Corp. v. Breswick & Co. Is a Unique Case and Its Continuing To Stand as the Controlling Precedent on the Acquisition of Control Requirement of the Interstate Commerce Act Places Form over Substance, Leads to Unreasonable and Arbitrary Results, and Permits the Commission To Extend the Scope of Its Regulation Beyond That Permitted or Intended by Congress.

This case graphically demonstrates, as Judge Campbell suggested, that the time has indeed come for a reexamination of **Alleghany Corp. v. Breswick & Co.**, *supra*, 353 U. S. 151 (1957). For the reasons discussed below, **Alleghany** should be overruled, or at least limited to its unique facts and not applied here.

A. This Court's Decision in Alleghany.

The Facts of Alleghany.

The Alleghany Corporation ("Alleghany"), a non-carrier investment company, controlled the New York Central Railroad Company ("Central"). Central controlled the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (the "Big Four"), which, in turn, controlled the Louisville & Jeffersonville Bridge and Railroad Company ("Jeffersonville"). Thus, through its control of Central, Alleghany indirectly controlled the Big Four and Jeffersonville.[6]

6. Although Alleghany had clearly acquired control of three carriers, Central, the Big Four and Jeffersonville, it was not subjected to Commission regulation by reason of the acquisition and did not need Commission approval for it. Notwithstanding the apparent applicability of Sections 11343(a) and 11348(a) [*i.e.*, their predecessor section numbers] to a non-carrier's acquisition of

Those who controlled Alleghany wanted to continue its carrier status under the Act, preferring regulation under the Act to regulation by the Securities and Exchange Commission under the Investment Company Act of 1940.[7] Commission approval was sought and obtained under Section 11343(a) for the merger of Jeffersonville into the Big Four, and for the acquisition by Alleghany and Central, by reason of their control of the Big Four, of control of Jeffersonville.

6. (Cont'd.)
control of two or more carriers, the Commission frequently chooses not to apply the Act when a system of carriers, whether two or ten, is acquired at the same time. **Southern Pac. Transportation Co.—Merger—Southern Pac. Co.**, 334 I. C. C. 866 (1969); **Katy Industries, Inc.—Control—Missouri-K.-T. R. R.**, 331 I. C. C. 405 (1967); **Delaware & H. Co. (Del.) Merger, Delaware & H. Co. (N. Y.)**, 317 I. C. C. 177 (1962); **Woods Industries, Inc.—Control—United Transports, Inc.**, 85 M. C. C. 672 (1960); **Louisville & J. Bridge & R. R. Merger**, 295 I. C. C. 11 (1955). The principle established by the Commission—that Sections 11343(a) and 11348(a) do not apply to an acquisition of control of an established system of carriers—has also been applied by it to cases involving rearrangements of existing control in a system [**Transcontinental Bus System, Inc.—Control—American Buslines, Inc.**, 87 M. C. C. 795 (1961); **Brink's Express Co. of Canada, Ltd.—Control—Direct Winters Transport Ltd.**, 101 M. C. C. 639 (1966)].

Thus, an acquisition of control of UPS-Ohio and UPS-New York by a company other than UPS-America would be outside the scope of Sections 11343(a) and 11348(a), under the foregoing line of Commission decisions. UPS-America is placed in a worse position than a new purchaser of both these carriers, even though UPS-America will merely *retain* control of the established system represented by UPS-Ohio and UPS-New York.

7. In 1945, the Commission had found that Alleghany should be considered as a carrier and subjected to Commission regulation under Section 11348(a), by reason of its acquisition of control of Norfolk Terminal & Transportation Company, through another carrier it controlled (Chesapeake & Ohio Railroad). However, by 1954, when Alleghany acquired control of Central, Alleghany had ceased to control Chesapeake, and was in danger of losing its carrier status and the attendant exemption from regulation under the Investment Company Act of 1940.

The Alleghany Test.

It was in the factual setting described above that the Court established the criteria for determining whether a rearrangement of existing control constitutes an "acquisition of control" under Sections 11343(a) and 11348(a). In **Alleghany,** the Court said (353 U. S. at 169):

> "The crux of each inquiry to determine whether there has been an 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the *power* of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease?" (Emphasis added.)

The Alleghany Holding.

Applying these considerations, the Court found that, through the merger, Alleghany had significantly increased its power over Jeffersonville. The Court's rationale was as follows (353 U. S. at 170):

> "While the immediate practical effects of the merger on the operation of the Jeffersonville might be small, even minimal, a merger is the ultimate in one company obtaining control over another. So long as the Jeffersonville existed as a separate company, there was always the possibility that the Big Four, through the Central, might sell, or be forced to divest itself of, the Jeffersonville stock, and that the control of the Jeffersonville might thus pass to another railroad. In considering this possibility, *it is important to note that the Jeffersonville does not connect physically with the Big Four but connects with it only by virtue of the Big Four's trackage rights over the Baltimore & Ohio, and that the Jeffersonville, with its few miles of track, also connects with the Pennsylvania, Baltimore & Ohio, Louisville & Nashville, Illinois Central, and Chesapeake & Ohio Railroads.* [Emphasis added.]
>
> "The merger of the Jeffersonville into the Big Four virtually precludes any change in the relation of the Jeffersonville lines to the Central system. The Jeffersonville will be no more. In view of this, it cannot reasonably be said that there has been no increase in the power of the Big Four, the Central, and, through its relation with them, Alleghany over the Jeffersonville."

Accordingly, the Court held that the merger of two carriers controlled by Alleghany, Jeffersonville and the Big Four, involved an acquisition of control by Alleghany over the properties of Jeffersonville under Section 11343(a), and that Alleghany was to be regulated as a carrier under Section 11348(a).

B. Alleghany Created an Artificial Rule.

The central question in this case is whether what is supposed to be the "crux" of the inquiry, according to **Alleghany**—the nature of the change in relations among the companies involved—may encompass paper changes, or must rather be directed at substantive changes in the control relationships. There is no dispute here over the effects of the proposed merger of UPS-America's carrier subsidiaries. The transaction is a simple one: UPS-New York will merge into UPS-Ohio, with UPS-Ohio as the surviving corporation. In place of controlling every aspect of the management, affairs, operations and properties of

two carrier subsidiaries, UPS-America will do so as to *one* carrier subsidiary. That the carrier rights and properties of UPS-New York will become vested in UPS-Ohio will make no difference either to the conduct of the carrier operations of these subsidiaries, since such operations are already fully integrated, or to UPS-America's ability to direct them. There is no situation such as that described (and italicized at pages 16-17, above) in **Alleghany,** where the inter-railroad relationships and operations could have been changed before the merger, but could not have been changed after merger. The only effect of the proposed merger in the present case will be to simplify administrative chores at a subsidiary level, by reducing the record keeping, accounting and reporting work and regulatory chores. The reduction in time-consuming paperwork simply has no bearing on the parent-subsidiary control relationship.

Yet, under the enforced aegis of **Alleghany,** as reluctantly conceived by the Court below, what is clearly a paper transaction from the standpoint of UPS-America is deemed to cause a significant increase in the *power* of UPS-America over the carrier rights and properties of UPS-New York, because the merging carrier "will be no more," and because "a merger is the ultimate in one company obtaining control over another" (**Alleghany,** 353 U. S. at 170). To state that **Alleghany** "seems to stress form over substance," as did concurring Judge Campbell below (A53), is to put it mildly. The fact is that, with due deference, **Alleghany** makes no sense and is bad law, at least as applied to the present situation, whatever its practical validity in the very different factual context facing the Court in 1957.

The merger of carrier subsidiaries, whether here, in **Alleghany,** or in any other case, is obviously the ultimate

in one company's obtaining control over another—but which company? The "ultimate" in control is obtained by the surviving company in the merger (here UPS-Ohio, a regulated carrier), to which all of the merging company's rights and properties are transferred. It does not follow, however, that the control of UPS-America, the parent company, would be affected in the least. From the parent company's standpoint, it may make no difference to its control, in the statutory sense, which entity possesses the rights and properties being transferred,[8] and in this case it makes no difference whatever in control. Similarly, the disappearance of the merging subsidiary (UPS-New York) does not, in itself, add to the parent company's ability to manage, direct and supervise the operation of the rights and properties being transferred, in a merger, from one subsidiary to another. To conclude that the transfer of carrier rights and properties from one subsidiary to another through a merger, and the disappearance of one subsidiary, evidence an acquisition of control by the parent company, is to gloss over the very factors which are supposed to be the "crux" of the inquiry—the nature of the change in relations among the companies involved and the effect of the transaction on corporate power. And it is, of course, axiomatic that the only participant in the merger that acquires greater control (UPS-Ohio) remains a completely regulated entity, as it was before the merger.

Certainly the "acquisition of control" language in the Act must be given more substance than the artificial result reached here by applying **Alleghany.** The form over substance approach to applying the control provisions of the

8. The Commission's definition of control is not disputed. "Control is generally defined to be the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." **New York C. & St. L. R. R. Control,** 295 I. C. C. 703, 713 (1958). *Accord,* **Colletti—Control—Comet Freight Lines,** 38 M. C. C. 95, 97 (1942).

Act in Sections 11343(a) and 11348(a) clashes with the clear statutory language and the congressional intent.

As enacted in the Emergency Railroad Transportation Act of 1933, 48 Stat. 217, Sections 11343(a) and 11348(a) (formerly contained in Section 5) and related provisions of the Act were intended to provide the Commission with the opportunity to pass upon railroad "consolidations, unifications, common controls and common managements *being effected, in the future,* . . . in order that transactions resulting in combinations and controls of carriers may be accomplished in an orderly manner, with due regard to the [Commission's] consolidation plan and the public interest." **H. R. Rep. No. 193,** 73d Cong., 1st Sess. 16 (emphasis added).[9] The weakness of the old Section 5, as it existed before the Emergency Railroad Transportation Act of 1933, was that non-carriers had been accomplishing unifications of carrier properties into rail systems, bringing previously separate and independent carriers under common control, without supervision by the Commission and without any opportunity for the Commission to consider the public interest. **H. R. Rep. No. 193,** *supra* at 19-21; **S. Rep. No. 87,** 73d Cong., 1st Sess. 8-10. Indeed, as the Commission has recognized, "[i]n construing section 5 [now Sections 11343(a) and 11348(a)], it must be borne in mind that it was intended primarily to subject to our jurisdiction the effectuation of control of two or more carriers in a common interest, or the unification of the properties of two or more carriers, *previously under separate control or ownership.*" **Knaus-Lease-Knaus Truck Lines, Inc.,** 39 M. C. C. 267, 269 (1943) (emphasis added).

9. Provisions concerning acquisitions of control of motor carriers similar to those applicable to railroads were enacted in Section 213 of the Motor Carrier Act of 1935, 49 Stat. 555. Section 213 was repealed and Section 5 was extended to motor carriers in the Transportation Act of 1940, 54 Stat. 905, 924.

Thus, in enacting the control provisions of the Act, Congress meant to cover an "acquisition of control" in the ordinary sense of that term—one which has prospective application. "Acquire" means to come into possession of; "to come to have as a new or additional characteristic, trait, or ability." **Webster's New Collegiate Dictionary** 11 (1975). Certainly one cannot "acquire" that which one already has. The Commission's interpretation, which prevailed in **Alleghany,** has converted the jurisdictional requirement in Section 11348(a) of an "acquisition of control" to that of a "continuation of control."

In this case, no new control will be obtained by UPS-America in the transaction at issue. No unification of previously separate carrier systems will be effected. No new or greater power to influence the management or affairs of the existing carrier system will be gained by UPS-America. This is not a case involving a merger of carriers "previously under separate control or ownership." Moreover, the merger in question is fully subject to Commission scrutiny and approval under clause (1) of Section 11343(a), without having to invent an "acquisition of control" under clause (5) of Section 11343(a).

C. To the Extent Alleghany Might Be Justified by the Unique Facts of That Case, It Should Be Limited to Those Facts.

If **Alleghany** has any surviving validity whatsoever, the disappearance of Jeffersonville upon consummation of the merger there must have resulted in a significant increase in Alleghany's power over Jeffersonville's carrier rights and properties, as the Court found. The only explanation which can be gleaned from the Court's opinion is that, before the merger, by reason of the particular juxtaposition of a number of railroads and trackage rights, there

was a distinct possibility that Alleghany and Central, prior to the merger, would lose control over Jeffersonville, and the merger virtually precluded that possibility (see quotation at pages 16-17, *supra*).

Such circumstances do not, however, provide a sound basis upon which to judge other cases involving mergers of controlled carriers or other forms of rearranging control within a carrier system. Indeed, soon after **Alleghany** was decided, the Commission ignored **Alleghany** altogether in determining whether the merger of two carrier subsidiaries effected an acquisition of control by their parent under Section 11343(a). *See* **Atlantic Coast Line R. R. Merger, Charleston & W. C. Ry.**, 307 I. C. C. 614 (1959).[10] *See also*, **Santa Fe Trail Transportation Co.—Purchase—Santa Fe Transportation Co.**, 90 M. C. C. 123 (1962).

If **Alleghany** is to have any basis in fact or any bearing on the consideration of changes in control, its holding must be limited to the unique circumstances upon which the decision necessarily rested, or similar circumstances involving a realistic susceptibility to a loss of control. In UPS' case, no one suggests that there is danger of a loss of UPS-America's control of the rights and properties of UPS-New York, which it wholly owns, controls and manages. Since the two carriers to be merged constitute a single, totally integrated system, they cannot feasibly be split apart operationally; they are too inextricably bound together for either to be separately acquired. Therefore, the merger would have no effect on any possible loss

10. The Commission's decision in **Atlantic** is also noteworthy in that the same simplification in record keeping, accounting and reporting work and regulatory chores that were here deemed to evidence an increase in the power of UPS-America, also were expected to result from the merger there. Yet, in **Atlantic**, the Commission did not consider such factors to be relevant to the question of control.

of control of UPS-New York; both before and after the merger, the carrier rights and properties of UPS-New York and UPS-Ohio would have to be acquired together. Contemplation of a loss of control here is speculative and completely unrealistic.

The anomalous results which the Court below reluctantly held were dictated by **Alleghany** can be avoided by overruling that 1957 decision, or by taking advantage of the opportunity presented by this case to make it clear that (i) **Alleghany** did not establish a *per se* rule in merger transactions, (ii) **Alleghany** requires a significant change in the parent-subsidiary control relationship, a change which was held to be present in **Alleghany** because of its unique facts, not present here in any sense, and (iii) where a parent company has total control over the carrier rights and properties of two subsidiaries, it does not acquire control thereof under the Act when it merely rearranges the location of these rights and properties in its system by a merger of one subsidiary into the other.

CONCLUSION.

We stated at the outset, and we repeat here, that the Court below felt constrained to apply **Alleghany** and thus prevent an obviously desirable merger. With full deference, we think it not presumptuous to say that the Seventh Circuit came as close to inviting *certiorari* as a court can come with propriety. Two judges sympathized with our position, quoting approvingly from Mr. Justice Douglas' dissent in **Alleghany**, but concluded that our recourse had to be to the Congress or to the Supreme Court (A52-A53). The concurring judge was even more explicit. He said **Alleghany** "seems to stress form over

substance," also referred to Mr. Justice Douglas' dissent, and expressly suggested "a re-examination of *Alleghany*" (A53-A54). These unusual expressions by the Court below are welcome supports for our position. This case cries for a grant of this petition, and a subsequent overruling or setting to one side of **Alleghany** as a bar to the consummation of an approved, and obviously desirable, corporate simplification of a major carrier, a simplification which otherwise will not be consummated.

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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Dated: January 9, 1980

Appendix.

INTERSTATE COMMERCE COMMISSION
No. MC-F-12641 [1]

UNITED PARCEL SERVICE, INC. (OHIO)—
MERGER—UNITED PARCEL SERVICE,
INC. (NEW YORK)

Decided April 6, 1977

1. In No. MC-F-12641, merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service, Inc., an Ohio corporation, for ownership, management, and operation, and acquisition by United Parcel Service of America, Inc., a Delaware corporation, of control of the operating rights and property, through the transaction, approved and authorized, subject to conditions.

2. In Finance Docket No. 27999, authority granted for United Parcel Service, Inc., to issue 196,250 shares of its common capital stock, par value $100.

Everett Hutchinson, S. Harrison Kahn, Robert L. Kendall, Jr., and *Irving R. Segal* for applicants.

Michael N. Khourie, A David Millner, and *George A. Olson* for protestants.

1. This report embraces Finance Docket No. 27999, United Parcel Service, Inc. Stock.

REPORT OF THE COMMISSION

REVIEW BOARD NUMBER 5
MEMBERS KROCK, POHOST AND TAYLOR

BY THE BOARD:

The modified procedure has been followed, and the matter has been assigned to the Board for disposition.

By joint application filed September 18, 1975, United Parcel Service, Inc., an Ohio corporation (UPS-Ohio), of St. Charles, Ill., and United Parcel Service, Inc., a New York corporation (UPS-NY), of New York, N. Y., seek authority under section 5 of the Interstate Commerce Act for the merger of the operating rights and property of UPS-NY into UPS-Ohio for ownership, management, and operation. By the same application, United Parcel Service of America, Inc., a Delaware corporation (UPS-America), of Greenwich, Conn., which controls UPS-Ohio through ownership of all its capital stock, seeks authority under the same section of the Act to acquire control of the operating rights and property through the merger. The gross annual revenue of the applicants from transportation subject to Part II of the Act exceeds $300,000.

By a separate application also filed September 18, 1975, in Finance Docket No. 27999, as a matter directly related to the above-described transaction in No. MC-F-12641, UPS-Ohio seeks authority under section 214 of the Act to issue 196,250 shares of its common capital stock, par value $100.

A protest to the merger application was filed jointly by Arrow Carrier Corp. and 19 other motor carriers, listed in the appendix. By order dated December 10, 1975, the proceeding was set for disposition pursuant to the Commission's rules of modified procedure. Verified statements in support of the applications were submitted by applicants. Verified statements in opposition to the merger were submitted by the protestants and by their counsel. In addition, counsel for the protestants submitted a memorandum of points and authorities in opposition to the merger, which memorandum included a petition for discovery and oral hearings. Applicants submitted a rebuttal statement and a reply to the petition for discovery and oral hearings.

UPS-Ohio and UPS-NY are wholly-owned subsidiaries of UPS-America, which does not itself hold any operating authority granted by this Commission. In addition to the two interstate carriers, UPS-America controls the following wholly-owned subsidiaries which are engaged in transportation: United Parcel Service of Pennsylvania, Inc., which conducts intrastate retail store delivery in western Pennsylvania; United Parcel Service, Inc. (Florida), which provides intrastate retail store delivery service for a retail department store in Miami, Fla.; United Parcel Service, Inc. (Virginia), which provides intrastate common motor carrier service in Virginia; United Parcel Service Co., which provides service as an air freight forwarder under the jurisdiction of the Civil Aeronautics Board; United Parcel General Services Co., which provides management services and help for the individual operating companies under the control of UPS-America; UPS, Ltd., a Canadian corporation; and Red Arrow Bonded Messenger Corporation, which provides service in Southern California.

In Docket No. MC-F-7321, *Yale Transport Corp. et al. v. United Parcel Service of America, Inc. et al.*, the issue of common control by UPS-America of UPS-Ohio and UPS-NY was the subject of a complaint. In that proceeding, the Commission found that control of the motor carriers in a common interest preceded the effective date of the Motor Carrier Act, 1935, and did not require ap-

proval of the Commission. *Greyhound Mergers,* 1 M. C. C. 342 (1936).

UPS-NY operates as a motor common carrier, pursuant to authority granted in certificate No. MC-116200 and subnumbered proceedings thereunder, of general commodities, with exceptions, and subject to restrictions, in the Middle Atlantic and New England states. The carrier is restricted against the transportation of packages or articles weighing more than 50 pounds or exceeding 108 inches in length and girth combined, is limited to 100 pounds aggregate shipments from one consignor at one location to one consignee at one location on any one day, and may not provide service between department stores, specialty shops and retail stores or the branches and warehouses of such stores, or between stores, specialty shops and retail stores, and their branches and warehouses, on the one hand, and, on the other, their customers. UPS-NY also holds authority as a contract carrier, granted in permit No. MC-63063 and No. MC-63063 (Sub-No. 4), of such commodities as are sold by department stores, between West Hartford, Conn., on the one hand, and, on the other, Manhasset, Eastchester, and New York, N. Y., under individual contracts with retail stores, and between New York, N. Y., and New Haven, Conn., under a continuing contract with Macy's New York.

A petition is pending before the Commission to eliminate the restriction against retail store delivery contained in UPS-NY's certificate No. MC-116200 (Sub-No. 2) with regard to the territory covered by its contract carrier permits. If the petition is granted, UPS-NY will surrender its permits Nos. MC-63063 and MC-63063 (Sub-No. 4).

UPS-Ohio operates as a common carrier, pursuant to authority granted in certificate No. MC-115495 and sub-

numbered proceedings thereunder, of general commodities, with exceptions, and subject to the same restrictions as contained in the UPS-NY certificates, over a broadly defined territory, which, in summary, provides for service throughout the United States except for the Middle Atlantic and New England territories served by UPS-NY. UPS-Ohio also holds authority as a contract carrier, issued in permit No. MC-13426 and subnumbered proceedings thereunder, of commodities sold by retail department stores and new furniture and household furnishings, in Ohio, Kentucky, Indiana and Michigan, under individual contracts with retail stores, and in the Milwaukee, Wis., Cleveland and Cincinnati, Ohio areas under contracts with Sears, Roebuck and Company.

UPS-Ohio holds authority in its certificate No. MC-115495 (Sub-No. 14) to provide service between points in six southeastern states and nine midwestern states plus portions of three other midwestern states, on the one hand, and, on the other, points in Pennsylvania, West Virginia and Virginia within 10 miles of the Pennsylvania-Ohio, the West Virginia-Ohio, the West Virginia-Kentucky, the Virginia-Kentucky, the Virginia-Tennessee, and the Virginia-North Carolina state lines.

In *United Parcel Service, Inc., Extension—48 States,* 120 M. C. C. 747, the holding by UPS-Ohio of the certificate authorized to be issued therein and the holding by it and its affiliates of the permits heretofore issued to them were found to be consistent with the public interest and the national transportation policy.

UPS-NY holds authority in its certificate No. MC-116200 (Sub-No. 3) which extends into the above-described 10-mile strip, and joint service is now provided by the applicants through interchange in that strip. UPS-Ohio, in the instant proceeding, proposes to tack its Sub-

No. 14 with UPS-NY's Sub-No. 3 at numerous points and places within the 10-mile strip, thereby providing a single-line service in lieu of the present joint-line service. UPS-Ohio has not, however, submitted an appropriate OP-OR-9 application for authority to conduct such operations, as required by the Commission's Policy Statement of December 3, 1974.

Under the proposed plan of merger, at the time the merger becomes effective, each and every share of UPS-NY stock then outstanding shall be cancelled and the certificates representing those outstanding shares shall be surrendered for cancellation, and each of the 3,750 shares of UPS-Ohio stock then outstanding shall be converted and changed into 53 ⅓ shares of common stock having a par value of $100 per share. The number of shares outstanding of UPS-Ohio, the surviving corporation, would increase from 3,750 to 200,000, and $1,893,140 would be transferred from capital surplus and $17,731,860 from earned surplus (retained earnings) to the stated capital (capital stock) of UPS-Ohio, in the aggregate equalling 196,250 (the increase in the number of outstanding shares) multiplied by $100.

At present, the articles of incorporation of UPS-Ohio authorize it to issue 5,000 shares of common stock, of the par value of $100 each, of which 3,750 shares are now issued and outstanding. Pursuant to resolutions adopted by its board of directors and sole shareholder on August 22, 1975, UPS-Ohio proposes to amend its articles of incorporation to increase its stated capital to $20,000,000 and its number of authorized shares of common stock to 300,000 shares, par value $100, of which 200,000 shares would be issued and outstanding. The stock to be issued would be non-assessable and with all voting rights vested therein. UPS-Ohio states that the purpose of the proposed

issue of securities is to increase the amount of its capital stock and to that extent decrease its capital surplus and earned surplus. It is the belief of UPS-Ohio that in the case of a corporation such as itself, having total assets exceeding $200,000,000, a capital stock account of $20,000,000 presents a far more appropriate balance sheet than does a capital stock account of $375,000, particularly where, as in the case of UPS-Ohio the surviving company, a surplus of more than $160,000,000 may be so readily used to increase the capital stock account.

Applicants' Evidence

Applicants' evidence consists of the verified statements of J. Robert Peterson, Vice-President of both UPS-NY and UPS-Ohio, and Walter E. Danielewski, Treasurer of UPS-America and of its wholly-owned subsidiaries, UPS-NY and UPS-Ohio. Balance sheets and income statements for UPS-Ohio, UPS-NY, and UPS-America were submitted. An abstract of representative shipments and traffic summaries for January 1, 1975 through June 30, 1975 were also submitted.

The balance sheet of UPS-Ohio, as of March 31, 1975, indicates total assets $239,531,361: consisting of current assets $89,045,967, including cash $14,972,368, special deposits $117,754, temporary cash investments $10,800,136, accounts receivable $54,205,587, prepayments $4,027,273, and materials and supplies $4,922,849, carrier operating property less accumulated depreciation $147,347,762; net property used in other than carrier operations $97,900; investment securities and advances $3,018,321; and deferred charges $21,411. Total liabilities were $101,963,715, consisting of current liabilities $77,045,627 and deferred credits $24,918,088. Stockholder's equity was $137,567,646, consisting of capital stock $375,000, capital

surplus $643,040, and unappropriated retained earnings $136,549,606. Its income statement for 1974 shows operating revenues $874,129,561 and net income, after taxes, $31,795,164.

The balance sheet of UPS-America, as of March 31, 1975, indicates total assets $177,155,998: consisting of current assets $49,301,210, including cash $754,251, temporary cash investments $41,629,449, receivables from affiliated companies $5,591,552, and accounts receivable $1,325,958; tangible property $1,099; and investment securities and advances $127,853,689, including investments in subsidiary companies $5,525,647, advances to affiliated companies $99,183,783, and other investments $23,144,259. Total liabilities were $10,535,694, consisting of current liabilities $7,598,194 and long term debt due after one year $2,937,500. Stockholders' equity was $166,620,304, consisting of capital stock $64,067,108, capital surplus $33,273,287, and unappropriated retained earnings $69,279,909. In 1974, UPS-America had net income (presumably dividends from subsidiaries), after taxes, of $43,712,200.

The balance sheet of UPS-NY, as of March 31, 1975, indicates total assets $134,100,845: consisting of current assets $43,811,815, including cash $3,371,696, special deposits $16,290, accounts receivable $35,767,965, prepayments $2,436,975, and materials and supplies $2,218,889; carrier operating property, less accumulated depreciation, $86,735,933; net property used in other than carrier operations $3,553,097. Total liabilities were $107,088,508: consisting of current liabilities $40,823,249, advances payable to affiliated companies $52,784,519, and deferred credits $13,480,740. Stockholder's equity was $27,012,337, consisting of capital stock $1,000,000, capital surplus $250,100, and unappropriated retained earnings

$25,762,237. In 1974, UPS-NY had operating revenue $419,842,506 and net income, after taxes $3,172,158.

Applicants also submitted a pro forma balance sheet and income statement, indicating that had the proposed transaction been in effect as of March 31, 1975, UPS-Ohio would have total assets $370,613,885: consisting of current assets $132,857,782, including cash $18,344,064, special deposits $134,044, temporary cash investments $10,800,136, accounts receivable $89,973,552, prepayments $6,464,248, and materials and supplies $7,141,738; tangible property $237,734,692, consisting of net carrier operating property $234,083,695 and net property used in other than carrier operations $3,650,997; and deferred charges $21,411. Current liabilities would be $119,081,564; advances payable to affiliated companies, $49,766,198; and deferred credits would be $38,398,828. The capital stock account would increase to $20,000,000, leaving $143,367,295 unappropriated retained earnings. The pro forma income statement for the three months ending March 31, 1975, projects net income, after taxes, of $8,843,992, and operating revenues of $346,335,159.

Applicants state that the proposed merger reflects the culmination of a program of corporate simplification, and that further simplification is precluded by state laws requiring separate corporations for the services now performed by the remaining UPS-America subsidiaries. Applicants further state that no legal, regulatory, or practical reason now exists for continuing the UPS-NY and UPS-Ohio corporations as separate entities.

Protestants' Evidence

The protestants oppose the proposed merger because it is their belief that the merger is an attempt to conceal illegal subsidization of UPS-America affiliates thereby en-

abling UPS-NY to continue its practice of providing service at depressed rates in the metropolitan New York area. Protestants allege that UPS-NY has engaged in predatory competitive practices, such as depressed rate making, which have resulted in the diversion of traffic from the protestants to UPS-NY. Protestants also state that UPS-NY has consistently refused to interline traffic with the protestants on behalf of the shippers in the New York area.

Applicants' Rebuttal

In the rebuttal presentation, applicants contend that none of the issues raised by the allegations of the protestants is material to the disposition of the present proceeding, since the proposed merger will produce no change whatsoever in the service offered to the public, in the rates charged, or in the physical operations, nor in the jurisdiction of the Commission over the operations involved. Applicants also maintain that the allegations of the protestants have no merit.

Preliminary Issue

The protestants have petitioned for discovery and for oral hearings, and have urged that action in this proceeding be postponed until the proceeding in docket No. MC-C-8617, Arrow Carrier Corporation et al. v. United Parcel Service, Inc., in which the protestants have filed a complaint requesting investigation of the applicants' operations, has been resolved. We believe that the record in the present proceeding is sufficient so as to permit a decision to be reached, and that a further delay in this proceeding is unwarranted.

The protestants on previous occasions have sought to vacate the modified procedure order in this proceeding and to consolidate the instant transaction with No. MC-C-

8617. By order of January 26, 1976, such relief was denied, on the basis that consolidation would unduly broaden the issues involved and that the handling of the instant application under modified procedure would not prevent the protestants from utilizing oral hearing to settle any material disputes of fact in the complaint proceeding in No. MC-C-8617. The proceeding here before us on modified procedure is not the proper forum for considering freight rates in the metropolitan New York area; and our disposition of the applications now before us should not prejudice in any way a just and fair determination of the issue of concealment of unlawful operations in years past raised in the complaint proceeding. Therefore, we find that protestants have presented no material factual disputes relevant to the merger application, and the protestants' petition should be denied.

Discussion and Conclusions

The protestants' opposition to the proposed merger appears grounded solely on the charges of unfitness, as set forth in the proceeding in No. MC-C-8617. In this connection, we are of the opinion that those matters lack sufficient nexus to the instant applications to warrant a denial and as previously indicated, our dispositions of the issues here properly before us should not prejudice protestants in pursuing their complaint in No. MC-C-8617 to a just and fair conclusion.

With regard to the proposed merger in No. MC-F-12641, we find that United Parcel Service, Inc., an Ohio corporation, is able, financially and otherwise, to consummate the transaction; that no fixed charges will be incurred as a result of the transaction; and that no carrier employees would be adversely affected.

We are, however, in total disagreement with the applicants' assertion that the irregular route authority of

UPS-NY may, upon unification, be joined and combined with that of UPS-Ohio to provide direct service without the filing of an OP-OR-9 application for elimination of gateways. Applicants apparently base their argument on the manner in which the UPS-NY and UPS-Ohio authorities overlap for interchange, with numerous points at which joinder could be accomplished and with no circuity. "Where one existing interstate motor common carrier seeks to extend its irregular-route operating authority through unification with other existing irregular-route rights, sought to be acquired, and the possibility of tacking is involved (which, in effect, creates a gateway through which the acquiring carrier would be required to operate in order to maintain the integrity of the two separate certificates), the applicant carriers shall also be required to give notice in the application with respect to such tacking possibilities and to prove that the present or future public convenience and necessity require that those authorities be tacked or joined. If this additional showing cannot be made at the time the proposed merger, as here, is approved, then a "no-tacking" restriction will be placed on the approval. If a need to tack can be shown at that time, sufficient to warrant tacking of the two authorities, then this Commission will grant the operating authority directly between the point that could be served by the tacking of those operating rights." *Gateway Elimination,* 119 M. C. C. 530, 552-3.

The above-stated rule is clear; it does not matter that there are numerous points of interchange or that no circuity is involved, nor that the rights involved are presently under common control. This Board does not have before it the required application for the elimination of the gateways created by the instant transaction, and we have no choice but to restrict the rights acquired against tacking

with the rights presently held by UPS-Ohio. See Commission's Policy Statement of December 3, 1974.

Moreover, it appears that the applicants may have operated in disregard of *Gateway Elimination,* supra. For example, in his verified statement, J. Robert Peterson, vice-president of both UPS-Ohio and UPS-NY, states that UPS-Ohio tacks its authority in its certificates Nos. MC-115495 (Sub-Nos. 16, 20 and 22), covering 20 full states in the midwest, Rocky Mountain, and far west portions of the country, with its certificate No. MC-115495 (Sub-No. 14), which authorizes service between points in six southeastern states and nine midwestern states plus portions of three others, on the one hand, and, on the other, points in Pennsylvania, West Virginia and Virginia within 10 miles of the Pennsylvania-Ohio, the West Virginia-Ohio, the West Virginia-Kentucky, the Virginia-Kentucky, the Virginia-Tennessee, and the Virginia-North Carolina state lines. The gateway elimination rules, as set forth at 49 CFR 1065, provide that except where a carrier has been expressly authorized by this Commission to eliminate gateways and provide direct service, or on movements of 300 miles or less, or where the carrier's certificated authorities specifically authorize tacking or joinder, the carrier is prohibited from joining (tacking) any of its irregular-route certificated authorities on and after the effective date of the gateway regulations, April 5, 1974. Therefore, UPS-Ohio may join its irregular route authorities only on movements of less than 300 miles, or pursuant to authority granted to it in its certificates Nos. MC-115495 (Sub-Nos. 24G and 25G) and letter filing Sub E-1. The carrier should cease and desist operations in violation of 49 CFR 1065.

Finally, we are of the opinion that UPS-America should be considered a carrier under section 5(4) of the Act. In determining whether a noncarrier should be

made subject to the reporting, accounting and securities provisions of the Act, the Commission has relied upon the primary source of income test and the primary business test. Under either test, subjecting UPS-America to the full extent of those provisions is warranted. Its interstate carrier subsidiaries had revenues exceeding $1,250,000,000 in 1974, and the concern of its lesser subsidiaries is largely transportation related.

FINDINGS

We find that the merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service, Inc., an Ohio corporation, for ownership, management, and operation, and the acquisition by United Parcel Service of America, Inc., of control of the operating rights and property through the transaction upon the terms and conditions set forth in the application and agreement of record, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; and that, if the transaction is consummated, United Parcel Service, Inc., an Ohio corporation, will be entitled to operate under the operating rights granted in No. MC-116200 and subnumbered proceedings thereunder and in Nos. MC-63063 and MC-63063 (Sub-No. 4), which rights are herein authorized to be unified with rights otherwise confirmed in it, and to be embraced in a certificate and a permit to be issued in its name, with duplications eliminated; *provided, however,* that if the authority herein granted is exercised, and concurrently therewith, the operating rights acquired by United Parcel Service, Inc., an Ohio corporation, shall be subject to the restriction that the Commission may impose such terms, conditions, or limitations in the future as it may find necessary to insure that the holding by United

Parcel Service, Inc., an Ohio corporation, of the certificate and permit herein authorized to be issued and of its certificates and permits shall be consistent with the public interest and the national transportation policy within the meaning of section 210 of the Act; and that acceptance of the authority herein granted shall constitute acceptance of this reservation of jurisdiction; *provided, further,* that United Parcel Service, Inc., shall furnish this Commission with a copy of its amended articles of incorporation, properly certified, showing that it has authority to issue its shares, hereinafter authorized, prior to the issuance thereof; and *provided, further,* that the irregular route authority in certificate No. MC-116200 and subnumbered proceedings thereunder, as herein authorized to be acquired by United Parcel Service, Inc., an Ohio corporation, shall be restricted against tacking with its certificated irregular route authority.

We further find that United Parcel Service of America, Inc., is a carrier within the meaning of section 5(4) of the Interstate Commerce Act and should be made subject to the applicable provisions of sections 204(a)(1) and (2), 214, and 220 of the Act; and that United Parcel Service, Inc., an Ohio corporation, and to the extent appropriate, any motor carrier under the control of United Parcel Service of America, Inc., shall not, without the express approval of this Commission, (1) pay any dividend in cash or otherwise in excess of 50 percent of its earnings in that dividend period, (2) make any advances, whether in cash or property, to subsidiary, parent, or affiliated companies, (3) encumber any of its assets or the assets of any of its subsidiary or affiliated companies, for noncarrier purposes, or (4) engage in any other monetary or property transactions with its parent company or within its system of carrier and noncarrier companies, except those transactions considered necessary to and normally

conducted in the course of its motor carrier business; and that jurisdiction should be, and it is hereby, reserved in order to impose such further conditions as may become necessary and appropriate.

We further find that the proposed issue by United Parcel Service, Inc., an Ohio corporation, of 196,250 shares of common stock of the par value $100 per share, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX

The protestants in this proceeding are as follows:

Arrow Carrier Corp.	Rochelle Park, N. J.
A. F. T. Services, Inc.	Newark, N. J.
Alco Express Co. (Martin Lustbert & Abraham Lustbert, d/b/a)	North Bergen, N. J.
Barnet's Express, Inc.	Elizabeth, N. J.
Borough Express, Inc.	Garfield, N. J.
Bradley's Express, Inc.	Middletown, Conn.
Consolidated Carriers Corp.	New York, N. Y.
Esco Transport, Inc.	So. Kearny, N. J.
Fowler & Williams, Inc.	Scranton, Pa.
Friedman's Express, Inc.	Wilkes-Barre, Pa.
Greenberg's Express, Inc.	Newark, N. J.
Hempstead Delivery Co., Inc.	New York, N. Y.
Mazzeo & Sons Express	Emerson, N. J.
Morton Delivery	New York, N. Y.
New Deal Delivery Service	New York, N. Y.
Siegel & Cohen Express, Inc.	Newark, N. J.
Stone's Express, Inc.	Cambridge, Mass.
Stuart Express Co., Inc.	New York, N. Y.
Tri-State Transportation Co., Inc.	Bellmawr, N. Y.
United Marlboro Carriers Corp.	New York, N. Y.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington, D. C., on the 6th day of April, 1977.

No. MC-F-12641

UNITED PARCEL SERVICE, INC. (OHIO)—MERGER—UNITED PARCEL SERVICE, INC. (NEW YORK)

Finance Docket No. 27999

UNITED PARCEL SERVICE, INC., STOCK

Investigation of the matters and things involved in this proceeding having been made, and said Board, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That the petition of protestants, Arrow Carrier Corp., et al. for discovery and oral hearing, and postponement of the subject proceedings until the complaint proceeding, in No. MC-C-8617 has been resolved, be, and it is hereby, denied.

It is further ordered, That the merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service, Inc., an Ohio corporation, for ownership, management, and operation, and acquisition by United Parcel Service of America, Inc., of control of the operating rights and property through the transaction, upon the terms and conditions set forth in said report, be, and they are hereby, approved and authorized, subject to the terms and conditions set forth in said report.

It is further ordered, That United Parcel Service, Inc., an Ohio corporation, be, and it is hereby, authorized to issue 196,250 shares of its common stock, upon the terms and for the purposes herein stated.

It is further ordered, That if the parties to the transaction herein authorized in No. MC-F-12641 desire to consummate the same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, 218, and 221(c) of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm, in writing, to this Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That if the authority herein granted is exercised, United Parcel Service, Inc., shall submit for consideration a sworn statement, and one copy thereof, hereby required within 60 days after consummation of the transaction, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions and other costs incidental to the transaction, the assets acquired and liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That, except as herein authorized, the above-described stock shall not be sold, pledged, repledged, or otherwise disposed of by United Parcel Service, Inc., unless or until so ordered or approved by this Commission.

It is further ordered, That United Parcel Service, Inc., shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applica-

tions filed under section 214 of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That pursuant to section 20a(3) of the Act, The Commission may, from time to time, for good cause shown, make such supplemental orders herein as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so authorized or the proceeds thereof may be applied.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof and this order shall be effective 30 days from the date it is served.

And it is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force or effect.

By the Commission, Review Board Number 5.

ROBERT L. OSWALD,
Secretary.

(SEAL)

[Portions relevant to control issue appear at pages A22-A31 and A40-A42.]

INTERSTATE COMMERCE COMMISSION

No. MC-F-12641 [1]

UNITED PARCEL SERVICE, INC. (OHIO)

—MERGER—

UNITED PARCEL SERVICE, INC. (NEW YORK)

Decided August 21, 1978

1. In No. MC-F-12641, merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service, Inc., an Ohio corporation, for ownership, management, and operation, and acquisition by United Parcel Service of America, Inc., a Delaware corporation, of control of the operating rights and property through the transaction, approved.
2. In Finance Docket No. 27999, authority granted for United Parcel Service, Inc., to issue 196,250 shares of its common capital stock, par value $100.
3. The proposed merger into United Parcel Service, Inc. (Ohio), of the operating rights and properties of its wholly owned subsidiary, United Parcel Service, Inc. (New York), found to be a transaction which empowers the Commission to assert jurisdiction over noncarrier United Parcel Service of America, Inc., as a carrier under section 5(4) of the Interstate Commerce Act.

1. This decision embraces Finance Docket No. 27999, United Parcel Service, Inc.—Stock.

4. Regardless of broad territorial overlap between the certificates of the involved carriers, upon merger the former interchange points between such authorities become gateways and the merged corporation becomes subject to the Commission's gateway elimination rules and procedures.

5. Existing gateway operations of United Parcel Service, Inc. (Ohio), found to be in contravention of the gateway rules, 49 CFR 1065.

Everett Hutchinson, S. Harrison Kahn, Robert L. Kendall, Jr., and *Irving R. Segal* for applicants.

Michael N. Khourie, Arthur Liberstein, A. David Millner, and *George A. Olson* for protestants.

DECISION OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By joint application filed September 18, 1975, United Parcel Service, Inc., an Ohio corporation (UPS-OH), of St. Charles, IL, and United Parcel Service, Inc., a New York corporation (UPS-NY), of New York, NY, seek authority under section 5 of the Interstate Commerce Act for the merger of the operating rights and property of UPS-NY into UPS-OH for ownership, management, and operation. United Parcel Service of America, Inc., a Delaware corporation (UPS-A), of Greenwich, CN, which controls UPS-OH through ownership of all of its capital stock, joins in the application.[2] The application is opposed by 20 motor common carriers.

2. UPS-A argues that it joined in the application merely to indicate its continuing control of its subsidiaries, UPS-OH and UPS-NY, and that the application now should be dismissed as to UPS-A.

By a separate application filed September 18, 1975, in Finance Docket No. 27999, as a matter directly related to the above-described merger, UPS-OH seeks authority under section 214 of the act to issue 196,250 shares of its common stock.

By report and order dated April 6, 1977, Review Board Number 5 approved the proposed merger and stock issue and made a number of other findings: (1) The authority authorized to be acquired by UPS-OH was restricted against tacking with its existing irregular-route authority. (2) UPS-A was found to be a carrier within the meaning of section 5(4) of the act and was made subject to enumerated provisions of the act. (3) Four additional types of financial transactions were made subject to prior Commission approval when sought to be completed by any motor carrier under the control of UPS-A. (4) The board stated that UPS-OH should cease and desist from existing operations in violation of the gateway rules, 49 CFR 1065.

On June 8, 1977, petitions for reconsideration of the review board's order were filed by both applicants and protestants. Replies to each petition were filed by opposing parties on June 28, 1977. On June 30, 1977, protestants filed an amendment to its reply seeking waiver of rule 101 (now rule 98(c)) of the Commission's General Rules of Practice, 49 CFR 1100.98(c), the acceptance of "new evidence," and an oral hearing. On July 1, 1977, applicants replied to protestants' amendment.

The evidence, the review board's order and the pleadings have been considered. Except as discussed below all matters of fact and law raised on petition were considered adequately and disposed of properly in the review board's report and order of April 6, 1977. The statement of facts in the review board's report is correct in all material respects and as supplemented herein we adopt it

as our own. The facts (to the extent necessary for clear discussion) and the contentions of the parties will be discussed in conjunction with the individual issues to which they pertain. While we agree substantially with the review board's conclusions, we believe that further discussion of the issues is warranted.

Section 5(4) Considerations

The first of four major issues which are raised by the parties is whether UPS-A is a carrier under section 5(4) of the act. In order to answer this question, we must resolve two more specific questions: (1) Is the proposed merger a transaction which empowers the Commission to assert jurisdiction over UPS-A as a carrier? and (2) What constitutes "acquisition of control" within the meaning of sections 5(2) and 5(4) of the act?

UPS-OH and UPS-NY are wholly owned subsidiaries of UPS-A, which itself does not hold any operating authority issued by this Commission. The control by UPS-A of these motor carriers in a common interest preceded the effective date of the Motor Carrier Act, 1935, and did not require approval of the Commission. UPS-A's primary argument is that section 5(4)[3] does not apply under the circumstances presented here because UPS-A already owns and controls both carriers involved in the merger. Since it does not "acquire control of any carrier or of two or more carriers," as required by section 5(4), it assertedly cannot be subjected to the provisions of that section.

3. Section 5(4) of the act, as pertinent: "Whenever a person which is not a carrier is authorized, by an order issued under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control * * *."

In *Alleghany Corporation v. Breswick,* 353 U. S. 151 (1957), the Supreme Court was faced with an issue similar to that presented here. In that case the Alleghany Corporation (Alleghany), and the New York Central Railroad (NYC), which was controlled by Alleghany, filed an application with the Commission for approval of the merger of the Louisville, Jeffersonville Bridge and Railroad Company (Jeffersonville), into the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company (Big Four). At the time of the application the Big Four already owned all of the capital stock of the Jeffersonville and virtually all of the stock of the Big Four was owned by NYC. In *Louisville & J. B. & R. Co. Merger,* 295 I. C. C. 11 (1955), the Commission approved the proposed merger and found that Alleghany was a carrier under section 5(3) of the act (now section 5(4)). In reviewing this finding the Supreme Court stated that the substantive issues under litigation involved the jurisdiction of the Commission under sections 5(2) and 5(3) of the act, defining the Commission's powers. The validity of the finding of Alleghany's status as a carrier under section 5(3) turned on compliance with section 5(2) which requires Commission approval for a person which is not a carrier and which has control of one or more carriers *to acquire control* of another carrier through ownership of its stock or otherwise. In answering the question of whether the Jeffersonville merger involved an acquisition of control by Alleghany over the properties of the Jeffersonville, the Court examined the broader issue of what constitutes an acquisition of control.

The Court set out the following standard for determining this issue: "The crux of each inquiry to determine whether there has been 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for ap-

proval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease?" *Id.* at 169. After examining the change in relations between the companies involved, the Court concluded that there had been an increase in power of the Big Four, NYC, and Alleghany over the Jeffersonville. Therefore, the Court upheld the Commission's application of section 5(3) of the act to Alleghany.

The corporate relationships involved in *Alleghany* were somewhat different from those which are involved here. The Jeffersonville's stock was owned by the Big Four which was controlled in turn by NYC. Prior to the merger, Alleghany controlled the Jeffersonville indirectly through this vertical chain of subsidiaries. In contrast, UPS-A owns all of the capital stock of both UPS-OH and UPS-NY and controls both companies directly. The contemplated merger is of one directly owned subsidiary into another rather than of a farther removed subsidiary into a more proximate one. Standing alone, this dissimilarity in corporate structure does not dictate a conclusion different from that reached in *Alleghany,* since the Court expressly stated that the immediacy or remoteness of the parent from the proposed transaction is not the issue to be considered. *Id.* at 169. The crux of each inquiry is the change in relations between the companies whose transaction is before the Commission. In this case, all three companies—UPS-A, UPS-NY, and UPS-OH—should be regarded as parties which have a transaction before the Commission, since UPS-A owns 100 percent of the stock of both UPS-OH and UPS-NY, whose merger is contemplated. Therefore, in determining whether the transaction results in an acquisition of control by UPS-A, the

critical question presented is whether, as between the involved companies, the merger of UPS-NY into UPS-OH will result in an increase in power on the part of UPS-A over the other two companies, *e.g.,* an increased voice in management or operation, or an increased ability to accomplish financial transactions or operational changes with greater legal ease. Clearly, as admitted by UPS-A, the transaction involved here will simplify the relationship of UPS-A with UPS-NY and UPS-OH, since where there were once two separate entities to be dealt with legally, financially and operationally, after the merger there will be one. UPS-A states that it "* * * had expected by the proposed merger to simplify its corporate accounting and reporting work, and perhaps some of the tariff publishing work, as well as the regulatory chores of the Commission." Applicants' petition for reconsideration of report and order of Review Board Number 5 at page 15. We conclude that the transaction will allow UPS-A to accomplish financial transactions or operational changes with greater legal ease, as UPS-A itself contemplates, and thus will result in an acquisition of control on the part of UPS-A.

In addition to the argument that UPS-A cannot be subjected to the provisions of section 5(4) since there is no acquisition of control, applicants also argue that prior Commission decisions preclude a determination that UPS-A is a carrier. They argue that the review board's conclusion that UPS-A is a carrier is inconsistent with the Commission's determination that UPS-A is not subject to the act in *United Parcel Service of New York, Inc., Com. Car. Applic.,* 79 M. C. C. 629 (1959), affirmed *sub nom. Yale Transportation Corp. v. United States,* 185 F. Supp. 96 (S. D. N. Y. 1960). The pertinent holding in this case was that the new operating authority granted to UPS-NY pursuant to the extension application does not give rise to a situation in which UPS-A could be declared

a carrier within the meaning of section 5(4). No blanket or prospective finding was made by either the Commission or the court that UPS-A could not be considered a carrier pursuant to purchase or merger applications such as that being considered here. Second, applicants cite a line of cases beginning with *Louisville & J. B. & R. Co. Merger*, 295 I. C. C. 11 (1955),[4] which hold that the acquisition of control by a noncarrier holding company of a "single established system" is not within the Commission's jurisdiction. The basis of the Commission's determination in this line of cases that it was without jurisdiction under the act to regulate the involved acquisitions, was that the noncarrier holding companies were seeking to acquire their *first* regulated carrier. Since the acquiring corporations did not "have control of one or more carriers" at the time of their applications, the Commission had no jurisdiction under section 5(2). Thus, Alleghany's acquisition of the NYC was not within Commission jurisdiction because Alleghany controlled no regulated carrier and the NYC was a single established system. Only in *Transcontinental*, see note 4, did the Commission depart from this interpretation. In that case, Transcontinental Bus System, Inc., sought authority under section 5 to acquire *direct* control of three bus companies which it controlled indirectly and to increase its control over two other bus companies. In finding that the transactions were not within the scope of section 5(2), division 3 stated that such transactions at most involve an acquisition of control of a single established system, outside the Commission's jurisdiction under *Louisville*. However, the Commission failed to apply the second requirement of *Louisville*, that the acquiring noncarrier person be in control of no regulated carrier at the time of the acquisition. The decision further implies that no acquisition may have been involved at all but does not apply the test for what constitutes an acquisition of control as set down in *Alleghany*.

4. As previously discussed, *Louisville* is the decision reviewed by the Supreme Court in *Alleghany*. The proposition for which it is cited by applicants was not considered by the court in *Alleghany*. The other cases cited by applicants relying on this principle: *Woods Industries, Inc.—Control—United Transports, Inc.*, 85 M. C. C. 672 (1960); *Transcontinental Bus System, Inc.—Control—American*, 87 M. C. C. 795 (1961); *Katy Industries, Inc.—Control—Missouri-K.-T. R. Co.*, 331 I. C. C. 405 (1967); *Southern Pacific Transportation Co.—Merger*, 334 I. C. C. 866 (1969).

The determination that UPS-A is a carrier within the meaning of section 5(4) of the act raises the second major issue which must be resolved: Are the statutory requirements and the requirement of Commission approval of certain financial transactions imposed on UPS-A by the review board appropriate? The board correctly relied on the "primarily business test" in subjecting UPS-A to all of the pertinent provisions of the act enumerated in section 5(4) (sections 204(a)(1) and (2), 220, and 214). The Commission consistently has held that when a noncarrier corporation is engaged substantially in transportation activities, the proper administration of our duties under the act requires that such company be treated as a motor carrier subject to the reporting, accounting and securities provisions of the act. *International Util.—Control—Pacific Intermountain*, 116 M. C. C. 66 (1971); *Pittston Co.—Control—Brink's Inc.*, 75 M. C. C. 345 (1958); *N. C. Purdie Corp.—Purchase—Hoffman's Motor Transp.*, 56 M. C. C. 495 (1950); *Edward M. Transit Co.—Purchase—Johnston M. Bus Lines*, 55 M. C. C. 515 (1949). As in *International*, it cannot be gainsaid that UPS-A has, and upon the consummation of the instant transaction will continue to have, an influence upon the national transportation which is immediate in effect and wide in scope.

The additional financial limitations placed on UPS-A by the board are argued to be unreasonably and unnecessarily restrictive. UPS-A asserts that the benefits of the

corporate simplification to be achieved through the merger would be grossly outweighed by the increase in complexity and cost of financial decisionmaking which would ensue as a result of these restrictions. It argues that no basis for imposition of such restrictions was given by the board and that they are beyond the Commission's jurisdiction to impose (especially with regard to dividends and advances).

Section 5(2)(b) of the act states in part:

> If the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable,* the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, *upon the terms and conditions, and with the modifications, so found to be just and reasonable.* [Emphasis added.]

This provision clearly empowers the Commission to impose the sort of conditions which are involved here. Applicants' contention that dividends and advances are not within the definition of "securities" in section 20a of the act is irrelevant in light of this explicit mandate to impose terms and conditions on approval of the transaction at the Commission's discretion. However, such discretion is not without guidance since any terms or conditions imposed must be found to be just and reasonable. Here, the review board did not make such finding and the facts of record do not indicate that the conditions imposed are just and reasonable. These identical restrictions were imposed on International Utilities, Inc. (IU), in *International, supra,* at 84. The basis of their imposition was an explicit finding by the Administrative Law Judge that IU had been billing a carrier under its control (Ryder Truck Lines, Inc.) for management services which were never performed. In order to insure against the possibility of such improprieties occurring in the future the involved conditions were found to be necessary.

In *Am. Exp. Industries, Inc.—Invest. of Control,* 116 M. C. C. 851, 866 (1974), the same stringent restrictions were applied because of (1) a violation of section 5(4) (now section 5(5)) by the involved parent corporation, (2) the payment by a subsidiary to the parent of a large dividend which later contributed to the subsidiary's financial difficulties, and (3) the poor financial condition of the parent. The evidence in the instant case does not reflect any improprieties or financial difficulties of applicants such as those which were of record in the above-discussed cases. In the absence of such evidence we are unable to justify the inclusion of the four conditions to the proposed merger which were imposed by the review board.

Gateway Considerations

The gateway issues in this proceeding arise out of the novel way the operating authorities of UPS-OH and UPS-NY overlap, as well as the way in which the existing certificates of UPS-OH overlap. The two broad questions presented are: (1) Does the proposed merger produce gateways such that the merged corporation should be subjected to the Commission's gateway elimination rules and procedures? and (2) Are UPS-OH's existing gateway operations in contravention of the gateway elimination rules, *Gateway Elimination,* 119 M. C. C. 530 (1974)? The territory common to the certificates of both UPS-OH and UPS-NY is a 10-mile-wide strip east and north of the boundaries between Ohio, Pennsylvania and West Virginia; Kentucky, West Virginia and Virginia; Tennessee and Virginia, and, North Carolina and Virginia. This produces a linear tacking area extending from Lake Erie to

the Atlantic Ocean. Interline operations (as well as "gateway" operations after the merger) can be performed with no circuity at all. Applicant asserts that similarly, the certificates of UPS-OH overlap in a monolithic band of Midwestern and Southern States extending from the Canadian border to the Gulf of Mexico such that existing operations between East and West are carried out over direct routes.

Applicants argue that upon unification, the irregular-route authority of UPS-NY may be joined with that of UPS-OH to provide direct service without the requirement of filing an OP-OR-9 application. They base this contention on the manner in which these certificates overlap: The gateway elimination rules do not apply to this situation because no "gateways" per se exist by virtue of there being no specific points within the common 10-mile strip at which tacking operations must be performed. Thus, unrestricted direct service is possible. Similarly, with regard to UPS-OH's existing tacking operations, it is argued that tacking between various certificates has never been at specified gateways since, in every instance, there is a common strip which extends the entire length of the boundaries of the geographical areas joined. Applicants further argue that in *United Parcel Service, Inc., Ext.—48 States,* 120 M. C. C. 747 (1974), decided after the gateway case, the Commission effectively granted to UPS-OH the right to perform service from coast to coast by the joinder of UPS-OH's existing certificates and interline with UPS-NY. Finally, applicants assert that if the gateway rules are applicable, the millions of packages moved by tacking and interchange (as represented by their appendixes D-4 and D-5 to the application) establish the public convenience and necessity for these operations.

There is a single threshold question which underlies all of the issues and arguments outlined above: What is a gateway? In *Gateway Elimination,* 119 M. C. C. 170, 171 (1973), the Commission defines a gateway:

> A gateway results from a motor common carrier combining or "tacking" two separate and unrestricted grants of irregular-route authority at a service point common to each—the gateway point—and conducting operations through the gateway from points served under one authorization to those served in the other. Thus, a motor common carrier authorized to transport the same commodity over irregular routes from Chicago, Ill., to Pittsburgh, Pa., and from Pittsburgh to Washington, D. C., may transport that commodity from Chicago to Washington via the Pittsburgh gateway.

Although this definition speaks in terms of common "points" of service, given the nature of irregular-route authority (often extending from one large geographical area to another), a strict interpretation of the use of this term would be unsupportable and never has been propounded by this Commission. On the contrary, it was explicitly recognized from the outset of the *Gateway Elimination* case that many irregular-route carriers have authority which covers large territorial areas and that tacking may take place at any point within these areas. *Gateway Elimination, supra* at 180. Thus, there never has been any doubt that the gateway rules apply when tacking can take place at any point in an entire State or States and applicant's 10-mile-wide tacking areas cannot logically be distinguished.

The second premise upon which applicants rely is that the lack of circuity involved in their operations make them contemplated by the gateway a special case. On the

contrary, the primary operations rules were those involving little or no circuity. The Commission states that "° ° ° most service conducted through gateways ° ° ° does not entail undue circuity and represents the most economical service patterns ° ° °." *Gateway Elimination, supra* at 171. The example given in the above-quoted definition involves no circuity whatsoever. The *Gateway Elimination Rules,* 49 CFR 1065 (1974), state as one prerequisite to elimination of gateways by filing of letter notices:

> (3) that the most direct highway distance between the points to be served is not less than 80 percent of the highway distance between such points over the carrier's authorized routing through the gateway.

This requirement patently includes gateways involving zero circuity. Therefore, it is clear that all of the Commission's gateway elimination rules and procedures apply to any tacking operations to be undertaken by applicants as a single (merged) carrier and likewise apply to any existing gateway operations of UPS-OH.

The appropriate portions of the gateway elimination rules now must be applied to the facts at hand. First, with regard to the gateways to result from the merger, the only factual basis stated by the review board for the imposition of a no-tacking restriction was that it did not have before it the "required application" for elimination of the gateways created by the transaction. In *Gateway Elimination,* 119 M. C. C. 530, 552-3 (1974), we state:

> ° ° ° [W]here one existing interstate motor common carrier seeks to extend its irregular-route operating authority through ° ° ° [unification with] other existing irregular-route rights, [sought to be acquired] and the possibility of tacking is involved (which in effect, creates a gateway through which the acquiring carrier would be required to operate in order to maintain the integrity of the two separate certificates), the applicant carriers shall also be required to give notice in the application with respect to such tacking possibilities and to prove that the present or future public convenience and necessity require that those authorities be tacked or joined. If this additional showing cannot be made *at the time the purchase is approved,* then a "no-tacking" restriction will be placed on the approval. [Emphasis added.]

The Commission's policy statement *Gateway Eliminations,* published in the Federal Register on December 3, 1974, further defines the procedures to be followed:

> In all future applications under section 5(2) the parties will be required to submit the requisite proof with the application under section 5(2) to justify tacking of the separate irregular route rights and to file a directly related OP-OR-9 application for the elimination of the gateway ° ° ° [Q]uestions of tacking will be handled in the section 5(2) proceeding ° ° ° Failure to seek and justify gateway elimination in any of the above-described situations will result in the imposition of a "no tacking" restriction.

Thus, the filing of a directly related gateway elimination application is required without exception in "all future applications under section 5(2)." We need not take the action of imposing a no-tacking restriction at this time because such an application has not been filed by applicants. No purpose would be served by penalizing applicants for misinterpreting the gateway elimination procedures in this extraordinary situation. In another proceeding, an applicant in a purchase application also requested approval of tacking of a portion of the purchased operating rights with

its existing certificates. It submitted traffic abstracts in support of the request, but did not file a directly related OP-OR-9 application until over a year later. The Commission authorized unification of the involved certificates with the effective date of the order stayed until the effective date of a final order in the directly related proceeding. No. MC-F-12688, *Mainliner Motor Express, Inc.—Purchase (Portion)—Bernard-Keith Cox. Doing Business as B. K. Cox Trucking,* (not printed), decided March 14, 1977.

As in the above-described proceeding, applicants will be allowed to late-file the requisite directly related application.

Applicants have made it clear that tacking of the involved operating authorities would continue after merger in the same manner as under interline arrangements prior to merger. The evidence submitted by applicants of interline movements conducted during stated time periods is substantial. The volume of this traffic is entirely sufficient to support a finding (not seriously contested by protestants) that the present and future public convenience and necessity requires tacking of the involved operating rights to allow service between the respective territories of each carrier. See *Childress—Elimination Sanford Gateway,* 61 M. C. C. 421 (1952), *J. V. McNicholas Transfer Co.—Control—Tom's Exp.,* 122 M. C. C. 786, 795 (1977). Such tacking will be allowed pending the final disposition of an appropriately filed directly related gateway elimination application and except to the extent that gateways are eliminated and direct service is authorized therein, tacking of the operating authority authorized to be acquired will be prohibited.

The gateway elimination rules also apply with full force and effect to tacking operations performed wholly

within UPS-OH's authorized territory. The Commission did not, as contended by UPS-OH, authorize joinder of the certificate issued in No. MC-115495 (Sub-No. 20) with applicants' existing certificates. In support of such a conclusion, UPS-OH quotes the following passage from the report granting the Sub-No. 20 certificate:

> A grant of this application will bring UPS service to all of the 48 contiguous States. It is applicant's intention to provide through service to and from points in those 48 States beyond the territory proposed by combining the operations here requested with its existing authorized operations and by interchanging freight with its New York affiliate * * *.

However, at this juncture in the decision, division 1 is stating the facts upon which applicant relied as well as applicant's intentions in the event of a grant. No approval of tacking operations (expressed or implied) is to be found anywhere in the report and no authorization is included in the resulting certificate. The above-quoted language is entirely consistent with this result since the application was filed on May 14, 1971, was pending on November 23, 1973 and under the gateway rules, clearly could have been the basis of timely-filed letter notices and OP-OR-9 applications resulting in 48-State authority. 49 CFR 1065.1 (d)(iii) and (d)(2)(ii)(b).

Thus, UPS-OH may not engage in any gateway operations except where the "300-mile exemption" applies or where its certificated authorities specifically authorize joinder or tacking. 49 CFR 1065.1(b). UPS-OH and its attorneys were well aware of the above-discussed requirements since a number of OP-OR-9G applications as well as a letter notice was filed in its behalf. UPS-OH is admonished to discontinue all tacking operations now being

conducted in contravention of these rules. We are mindful of the problems which can arise for UPS-OH as well as its customers as a result of this discontinuance. However, we cannot ignore the thousands of similarly situated carriers which, under great pressure, were able to file timely applications and letter notices under the gateway rules. UPS-OH (or the merged corporation, as appropriate) may file OP-OR-9 applications for authority to perform those through operations which no longer can be furnished without tacking. Evidence of gateway operations performed in good faith subsequent to the effective date of the gateway rules, because of a misinterpretation of such rules, would weigh heavily in favor of a finding that the public convenience and necessity requires such service.

Fitness

Virtually the entire basis of protestants' opposition to the sought merger is the belief that it is an attempt by applicants to conceal illegal subsidization by UPS-A of its affiliates, thereby enabling UPS-NY to continue a practice of providing service at depressed rates in the metropolitan New York area. This allegation as well as allegations of wrongdoing engaged in by applicants during the past 50 years all over the country is the subject of a complaint against applicants in No. MC-C-8617, now pending before the Commission. Protestants argue that the review board incorrectly refused to stay a final decision in this proceeding until the fitness issue finally is resolved in the above-cited complaint. They further contend that the board found the sought merger to be consistent with the public interest without adequately resolving the underlying issue of applicant's fitness in the instant proceeding.

In *Eagle Motor Lines—Pur.—Southwest Oilfield Trans.*, 116 M. C. C. 559 (1972), in a situation very similar

to the one presented here, the Commission stayed its approval of the involved transaction pending the outcome of a proceeding involving the fitness of the carrier which may have had a bearing on the consistency of the transaction with the public interest. Protestants' reliance on this case is misplaced in light of the Commission's *Fitness Flagging Procedures*, Ex Parte No. 55 (Sub-No. 23). The longstanding policy of the Commission to hold open pending application proceedings was discarded. Under the rules adopted, the Commission may not stay the decision in any application proceeding (including those filed under section 5(2) of the act) unless an order is issued directing an applicant to show cause why all or any of the applications identified in the order should not be flagged for fitness. We have not elected to institute this procedure in the instant case. The determination of applicant's fitness must proceed upon the evidence in this record.

While fitness is not stated in so many words by the act as a finding to be made in section 5 proceedings, a showing of fitness is a part of applicant's burden of showing the transaction to be consistent with the public interest. *Howard Van Lines, Inc.—Purchase—McHugo Transfer Co.*, 60 M. C. C. 57, 60 (1954). Given the gravity of a finding that a carrier is unfit to conform to the provisions of the act and the Commission's rules and regulations thereunder, we have consistently based such finding on a showing of willful and flagrant defiance of rules and regulations, an established record of unauthorized operations, and continued refusal to abide by the provisions of the act. In *Washum—Control—Washum*, 116 M. C. C. 158, 163 (1972) a finding of unfitness was based on a "continuing pattern of violations of regulatory requirements that have occurred over a number of years in the face of court orders." It must also be remembered that a denial of an application on the basis of an adverse fitness finding

is not a punitive measure directed against the carrier's past unlawful operations. It is rather a prospective safeguard which serves to protect the public from a carrier, which, by its conduct, has not demonstrated a willingness and ability to operate in accordance with the Commission's requirements. *United Parcel Service, Inc., supra* at 758-759.

The facts presented on this record do not establish the type of reprehensible conduct at which an adverse fitness finding would properly be aimed. Protestants' verified statements consist of cumulative, vague and unsubstantiated assertions of wrongdoing on the part of applicants. Protestants' counsel submits a "verified statement" to which voluminous material is appended (including contracts allegedly entered into by applicants as long as 28 years ago as well as interrogatories filed in antitrust proceedings pending in the United States District Court for the Southern District of New York), none of which establishes deliberate and continuing disregard for the provisions of the act. Protestants further argue that the decisions and/or records in a number of past proceedings involving applicants (including the recent decision in No. MC-116200 (Sub-No. 2)) should be considered here as leading to a finding of applicants' unfitness. Every case referred to has culminated in a finding of fitness of the involved applicant (whether UPS-OH or UPS-NY). Accordingly, we cannot find, based upon the evidence in this record, that the public interest would be served by a denial of the proposed merger on grounds of a finding that applicants are unfit.

FINDINGS

We find on reconsideration that the merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service,

Inc., an Ohio corporation, for ownership, management, and operation, and the acquisition by United Parcel Service of America, Inc. of control of the operating rights and property through the transaction upon the terms and conditions set forth in the application and agreement of record, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent with the public interest. If the transaction is consummated, United Parcel Service, Inc., an Ohio corporation, will be entitled to operate under the operating rights granted in No. MC-116200 and subnumbered proceedings thereunder and in Nos. MC-63063 and MC-63063 (Sub-No. 4), which rights are authorized to be unified with rights otherwise confirmed in it, and to be embraced in a certificate and a permit to be issued in its name, with duplications eliminated. If the authority granted is exercised, the operating rights acquired by United Parcel Service, Inc., an Ohio corporation, shall be subject to the restriction that the Commission may impose such terms, conditions, or limitations in the future as it may find necessary to insure that the holding by United Parcel Service, Inc., an Ohio corporation, of the certificate and permit authorized to be issued and of its existing certificates and permits shall be consistent with the public interest and the national transportation policy within the meaning of section 210 of the act. United Parcel Service, Inc., shall furnish this Commission with a copy of its amended articles of incorporation, properly certified, showing that it has authority to issue its shares prior to the issuance.

We further find on reconsideration that United Parcel Service of America, Inc., is a carrier within the meaning of section 5(4) of the act and should be made subject to the applicable provisions of sections 204(a)(1) and (2), 214, and 220 of the act. The proposed issuance by United

Parcel Service, Inc., an Ohio corporation, of 196,250 shares of common stock of the par value $100 per share, (a) is for lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. This decision is not a major Federal action significantly affecting the quality of the human environment.

ORDER

(1) The petitions of protestants Arrow Carrier Corp., et al., for reopening and assignment to oral hearing and for waiver of rule 98(c) (incorrectly styled rule 101(e) of the Commission's General Rules of Practice) are denied for the reason that no material factual disputes are presented which cannot be resolved on the present record.

(2) The merger of the operating rights and property of United Parcel Service, Inc., a New York corporation, into United Parcel Service, Inc., an Ohio corporation, for ownership, management and operation, and acquisition by United Parcel Service of America, Inc., of control of the operating rights and property through the transaction, upon the terms and conditions previously set forth are approved subject to the noted terms and conditions.

(3) United Parcel Service, Inc., an Ohio corporation is authorized to issue 196,250 shares of its common stock, upon the terms and for the purposes stated.

(4) If the parties to the transaction authorized in No. MC-F-12641 desire to consummate, they shall (1) promptly take such steps as will insure compliance with

sections 215, 217, 218, and 221(c) of the act, and with rules, regulations, and requirements prescribed thereunder and (2) confirm, in writing, to this Commission, immediately after consummation, the date on which consummation has actually taken place.

(5) If the authority granted is exercised, United Parcel Service, Inc., shall submit for consideration a sworn statement and one copy within 60 days after consummation of the transaction, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions and other costs incidental to the transaction, the assets acquired and liability assumed, indicating the account number and title to which each item has been or is to be, debited or credited. This information should be sent to: Bureau of Accounts, Room 6113, Washington, D. C. 20423.

(6) Except as authorized, the above-described stock shall not be sold, pledged, repledged, or otherwise disposed of by United Parcel Service, Inc., unless or until so ordered or approved by this Commission.

(7) United Parcel Service, Inc., shall report the involved matters in conformity with the order of the Commission, division 3, dated May 20, 1964, as amended, respecting applications filed under section 214 of the act (49 CFR 1115.6).

(8) Pursuant to section 20a(3) of the act, the Commission may, for good cause shown, make such supplemental decisions as it may deem necessary or appropriate, and may by any such supplemental decision modify the provisions of any previous decision as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so authorized or the proceeds thereof may be applied.

(9) This shall not be construed to imply any guaranty or obligation as to the stock or dividends on the part of the United States.

(10) Tacking of the operating rights of UPS-NY with the existing operating rights of UPS-OH is authorized, pending the ultimate disposition of an appropriately filed OP-OR-9 application for the elimination of the gateways created by the proposed merger. If no directly related gateway elimination application is filed within 90 days from the service date of this decision, and except to the extent that gateways are eliminated and direct service is authorized in such application, the irregular-route authority in certificate No. MC-116200 and subnumbered proceedings thereunder, as authorized to be acquired by United Parcel Service, Inc., an Ohio corporation, shall be restricted against tacking with its certificated irregular-route authority.

(11) Unless the authority granted is exercised within 180 days from the effective date, this decision shall be of no further force or effect.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Gresham, and Clapp. Commissioner Clapp concurring. Commissioners Murphy and Gresham not participating. Commissioner Brown absent and not participating.

H. G. HOMME,
Acting Secretary.

(SEAL)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-2446

UNITED PARCEL SERVICE, INC., an Ohio corporation, UNITED PARCEL SERVICE, INC., a New York corporation, and UNITED PARCEL SERVICE, INC., a Delaware corporation,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

ARROW CARRIER CORPORATION, et al.,
Intervening Respondents.

On Petition for Review of an Order of the Interstate Commerce Commission.

ARGUED SEPTEMBER 25, 1979—DECIDED OCTOBER 30, 1979

Before SPRECHER and WOOD, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*°

SPRECHER, *Circuit Judge.* The three affected corporations sought review of the Interstate Commerce Commis-

° Honorable William J. Campbell, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

sion's determination that a non-carrier holding company which owns all of the stock of two motor carrier subsidiaries that were operated as a single integrated carrier system would "acquire control" of the subsidiaries upon their merger under Section 5(2) of the Interstate Commerce Act, and would therefore become subject to partial regulation as a carrier under Section 5(4).

United Parcel Service of America (UPS-A), a Delaware corporation, is a holding company which owns all of the oustanding stock of United Parcel Service, Inc., a New York corporation (UPS-NY), operating as a motor common carrier in 13 Middle Atlantic and New England states, and all of the outstanding stock of United Parcel Service, Inc., an Ohio corporation (UPS-OH), operating as a motor common carrier in the remaining 35 mainland United States. In addition to controlling the two interstate carriers, UPS-A controls as subsidiaries motor carriers offering interstate retail deliveries in Pennsylvania, Florida, and Virginia, an air freight forwarder, and a bonded messenger service.

UPS-A has not been subject to Commission regulation heretofore because it acquired control of the two regulated carriers (UPS-NY and UPS-OH) prior to the effective date of the Motor Carrier Act of 1935.

UPS-NY, UPS-OH and UPS-A joined in an application to the Commission for authority under Section 5(2) of the Act to merge UPS-NY into UPS-OH. The Commission approved the proposed merger after finding that the merger constituted a transaction within the scope of Section 5(2) and was consistent with the public interest. The Commission further found that upon consummation of the merger, UPS-A would "acquire control" of the surviving corporation and become a carrier within the meaning of Section 5(4), subject to certain reporting and

accounting requirements of the Act. 127 M. C. C. 292 (1978). UPS-A, UPS-OH and UPS-NY have petitioned for review of the Commission's order.

The Interstate Commerce Act was revised, codified, and enacted, without substantive change, as subtitle IV of title 49 of the United States Code on October 17, 1978, shortly after the Commission entered the order appealed from here, which occurred on August 21, 1978. The new codification provides that an action taken under a law replaced by it shall be deemed to have been taken under the new codification.

Section 5(2)(a) now appears at 49 U. S. C. § 11343(a) and provides in pertinent part:

> The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commissio . . . may be carried out only with the approval and authorization of the Commission:
>
> (1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.
>
> * * * *
>
> (4) acquisition of control of at least 2 carriers by a person that is not a carrier.
>
> (5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

Section 5(4) now appears at 49 U. S. C. § 11348(a) and provides in pertinent part:

> When the Interstate Commerce Commission approves and authorizes a transaction . . . in which a person not a carrier providing transportation subject to the jurisdiction of the Commission . . . acquires control of at least one carrier subject to the jurisdiction of the Commission, the person is subject, as a carrier, to the following provisions of this title that apply to the carrier being acquired by that person, to the extent specified by the Commission: . . .

In order that UPS-A become a carrier subject to partial regulation the following must occur: the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers" (49 U. S. C. § 11343 (a)(5)) and "a person not a carrier . . . acquires control of at least one carrier" in a transaction authorized by the Commission (49 U. S. C. § 11348(a)) .

Our ability to review the Commission's order is greatly circumscribed by *Alleghany Corporation v. Breswick & Co.*, 353 U. S. 151 (1957), where the Supreme Court in effect approved the Interstate Commerce Commission's holding that Alleghany, being in control of the New York Central Railroad, was a non-carrier "considered as a carrier" when a subsidiary of Central (the Big Four Railroad, whose stock was largely owned by Central) incorporated by merger its subsidiary (the Jeffersonville Railroad, whose stock was all owned by the Big Four). In our case we have one wholly-owned subsidiary merging into another wholly-owned subsidiary and the parent is the non-carrier. In *Alleghany*, a wholly-owned subsidiary merged into its parent corporation, which was in turn largely owned by its own non-carrier parent. In both cases the parent (or ultimate parent in the case of *Alleghany*) was a non-carrier, held by the Commission to be a carrier for purposes of partial regulation by the Commission.

Although there is some factual difference, the reasoning employed by the majority of the Court in *Alleghany* appears to us to apply equally as well to this situation as it did to the *Alleghany* facts. In both cases, two subsidiaries telescoped into a single subsidiary—one vertically and the other laterally or horizontally. We shall examine these factual differences at greater length after we apply the broader principles of *Alleghany* to the present facts.

In the first place, the Court in *Alleghany* established the standard of appellate review for "this type of issue," saying:

> In deciding this type of issue, of course, the finding of the Commission that a given transaction does or does not constitute a significant increase in the power of one company over another is not to be overruled so long as "there is warrant in the record for the judgment of the expert body . . . ." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

353 U. S. at 169.

Whether "there is warrant in the record" in the present case in turn depends upon the Supreme Court's language in *Alleghany* as to the "crux of each inquiry." The Court said:

> The crux of each inquiry to determine whether there has been an "acquisition of control" is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, and not the

> immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case,[1] the parent can always, by operating through subsidiaries, make itself more remote.

353 U. S. at 169.

Specifically, in this case, has the Commission found and does the record show "the ability to accomplish financial transactions or operational changes with greater legal ease?"

The Commission concluded "that the transaction will allow UPS-A to accomplish financial transactions or operational changes with greater legal ease, as UPS-A itself contemplates, and thus will result in an acquisition of control on the part of UPS-A." 127 M. C. C. 292, 296 (1978).

The application to merge stated that "[t]he proposal is to merge the two carriers for reasons of corporate simplification," and "[t]he result of the merger . . . will be to achieve further corporate simplification . . . ."

The verified statement of a vice president of both UPS-NY and UPS-OH in support of the application included the following under the heading "Effects of the Merger":

> Upon completion of the proposed merger, there will be only one I. C. C. regulated carrier, in place of two. This will simplify the corporate and accounting work, and reduce the number of filings required by the I. C. C. and other regulatory agencies. The economies in administration and regulation resulting from this corporate simplification are apparent.

1. *United States v. Marshall Transport Co.*, 322 U. S. 31 (1944) [footnote by this court].

> The present joint line service between the two subsidiaries will be one single line service. There will be no effect on the manner in which the operation is conducted physically, or on service to the public. However, the regulatory requirements incident to interchange of equipment, and the inter-company accounting problems resulting from such interchange, will be eliminated.

UPS-A stated that it "had expected by the proposed merger to simplify its corporate accounting and reporting work, and perhaps some of the tariff publishing work, as well as the regulatory chores of the Commission." Applicants' petition for reconsideration of report and order of Review Board Number 5 at page 15; quoted in 127 M. C. C. 292 at 296.

The conclusions of the Commission are warranted by the facts on the basis of the *Alleghany* standards and principles.

We now examine in somewhat more detail the petitioners' argument that *Alleghany* is factually distinguishable. The Supreme Court discussed the factual details in 353 U. S. at 170:

> While the immediate practical effects of the merger on the operation of the Jeffersonville might be small, even minimal, a merger is the ultimate in one company obtaining control over another. So long as the Jeffersonville existed as a separate company, there was always the possibility that the Big Four, through the Central, might sell, or be forced to divest itself of, the Jeffersonville stock, and that the control of the Jeffersonville might thus pass to another railroad. In considering this possibility, it is important to note that the Jeffersonville does not connect physi-

cally with the Big Four but connects with it only by virtue of the Big Four's trackage rights over the Baltimore & Ohio, and that the Jeffersonville, with its few miles of track, also connects with the Pennsylvania, Baltimore & Ohio, Louisville & Nashville, Illinois Central, and Chesapeake & Ohio Railroads.

The merger of the Jeffersonville into the Big Four virtually precludes any change in the relation of the Jeffersonville lines to the Central system. The Jeffersonville will be no more. In view of this, it cannot reasonably be said that there has been no increase in the power of the Big Four, the Central, and, through its relation with them, Alleghany over the Jeffersonville.

The petitioners emphasize the fact that both UPS-OH and UPS-NY are 100% owned by UPS-A, but it should be noted that Jeffersonville was also 100% owned. Alleghany controlled Central, Central controlled the Big Four, and the Big Four owned 100% of Jeffersonville. The Supreme Court considered the "immediacy or remoteness of the parent from the proposed transaction" not to be an issue. What was important was that "[t]he Jeffersonville will be no more" even as the UPS-NY will be no more. And as the Court said, "a merger is the ultimate in one company obtaining control over another."

Congress has also given us some view of its intention in regard to carrier mergers. In 49 U. S. C. § 11343(a)(1) Congress required Commission approval and authorization of the merger of two carriers into one corporation in those cases where no holding company non-carrier is involved.

Although we sympathize with the petitioners' arguments that *Alleghany* involved unique facts, that Alleghany itself sought carrier status and Commission control, that corporate simplification should be encouraged rather

than discouraged, and that here UPS-A did not acquire control but only retained it, it appears to us that both Congress and the Supreme Court have determined these issues contrary to the petitioners' views and we are in no position to overrule either body.[2] It may be that only Congress or the Supreme Court can offer petitioners any relief.

We hold that the Commission was justified in finding that the merger of UPS-NY into UPS-OH involved an "acquisition of control" of UPS-NY by UPS-A within the meaning of Sections 5(2) and 5(4) of the Act.

The order of the Commission is affirmed.

AFFIRMED.

CAMPBELL, *Senior District Judge*, CONCURRING. I agree with the Court's conclusion that *Alleghany Corporation v. Breswick & Co.*, 353 U. S. 151, 77 S. Ct. 763, 1 L. Ed. 2d 726 (1957) controls this case. I therefore join in the result. I am compelled to add, however, that the portion of the *Alleghany* holding which defines an "acquisition of control" seems to stress form over substance. In *Alleghany*, as in the present case, the parent corporation controlled nothing upon completion of the merger

2. For example, Mr. Justice Douglas stated in his dissent:

> The merger was an intra-system rearrangement of properties that did not affect one whit Alleghany's "control" in the statutory sense of the Bridge Company. Before the merger Alleghany had "control" of the Bridge Company. It therefore did not "acquire control" but only *retained* it as a result of the merger.

353 U. S. at 177 (emphasis in original). But the dissent obviously did not prevail.

that it did not control prior to the merger. As Justice Douglas noted in dissent, "one who has control . . . does not acquire it when he merely changes the method or means of its exercise." *Id.* at 176. Perhaps the time has come for a re-examination of *Alleghany* in the light of more recent judicial pronouncements on the question of what constitutes corporate control.